

The complaint

Mrs M's complaint is about the conduct of her After the Event ('ATE') insurer, Financial & Legal Insurance Company Ltd ('F&L') following the conclusion of litigation she was involved in.

Mrs M says F&L treated her unfairly.

Mrs M is helped by a representative in this case who is the same firm of Solicitor's referred to as 'A' below.

In this decision, all references to F&L include their claims handlers.

What happened

Mrs M instructed a firm of Solicitors ('A') on a conditional 'no win no fee' arrangement to act for her in relation to a claim about the sale of solar panels. A took out an ATE policy on her behalf which was underwritten by F&L.

Mrs M's complaint is that F&L declined to cover her costs under the policy and unfairly voided it. She wants F&L to pay the costs she was entitled to under the cover.

F&L say that A, on Mrs M's behalf continued with the claim when there was a reasonable offer on the table, which in turn prejudiced their position and that they were entitled to decline cover accordingly.

Our investigator considered Mrs M's claim and concluded that it should be upheld in part. He said that although F&L were entitled to decline to cover the claim, they should not have voided it. F&L agreed with the investigator's outcome, but Mrs M did not. Because of this the matter has been passed to me to determine.

What I've decided – and why

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Having done so, I uphold Mrs M's complaint for broadly the same reasons and in broadly the same way set out by the investigator.

Before I explain why, I wish to acknowledge the volume of submissions made on Mrs M's behalf by A. Whilst I've read everything they've said, I won't be addressing it all. That's not intended to be disrespectful, but rather is representative of the informal nature of the Financial Ombudsman Service. Instead, I've concentrated on the crux of Mrs M's complaint- namely whether F&L treated her fairly.

The starting point is the policy terms. In summary, the ATE provides cover for Mrs M's opponent's costs and her own costs if included in the accompanying schedule and disbursements up to the limit of indemnity, subject to compliance with the policy terms and conditions.

In this case A discontinued Mrs M's claim against the other parties so the natural consequence of this was that she became liable for their costs incurred up to that point as well as her own. F&L have declined to cover these adverse costs as well as anything else under the policy and have voided it on the basis that the position Mrs M finds herself in was as a result of a failure to accept a reasonable offer- which they were not told about.

The policy terms required Mrs M's representatives to let F&L know immediately if an offer is made in the case and disclose anything that would materially affect her prospects of winning it within 14 days. The terms also entitled F&L to decline a claim if the proceedings have been conducted in such a manner to have prejudiced their position.

It's not in dispute that A didn't tell F&L about an offer that had been to Mrs M to settle her claim, nor that the merits of it changed following this which led to A discontinuing the proceedings against the other parties. From what I've seen A did recommend to Mrs M that she accept the offer made to her, which she agreed to, but A later failed to do this. I haven't seen anything that supports that this particular offer was communicated to F&L at all nor why the offer wasn't accepted in accordance with Mrs M's instructions by A. F&L say that had the offer been communicated to them, they would have insisted it be accepted but A's failure to disclose this to them and to accept the offer in accordance with Mrs M's instructions went on to prejudice their position. I haven't seen any explanation around why the offer wasn't disclosed to F&L and indeed why it wasn't accepted on Mrs M's behalf. But given it's fairly clear that the merits of the claim later changed and that this led to A discontinuing the claim, this prejudiced F&L's position here. I say so because they were being asked to pick up costs that would not otherwise have been incurred but for the failures I've cited.

Because of this I think that F&L were entitled to decline the claim in its entirety. When making this finding I accept that Mrs M wasn't responsible for A's actions but under the terms of the policy this makes no difference to the reporting obligations which are hers, even though the reporting is being conducted by A on her behalf. As such I can't say that F&L should be responsible for costs where a reporting obligation has not been complied with and there has been prejudice as a result. If Mrs M remains unhappy with A's actions, she can address this with the Legal Ombudsman and the Solicitor's Regulation Authority directly.

A has made representations about how reporting requirements were dispensed with in this case as it was part of a larger volume of cases it was working with F&L on. They've provided evidence to show that communications about their caseloads where ATE was being funded by F&L were conducted via spreadsheets and that this was accepted by F&L. But from what I've seen, there isn't anything to suggest that the offer made in this case was communicated to F&L at all and in any way, nor that F&L had the opportunity to consider its position about the offer at all. Because of this I think their communication methods make no difference here. Similarly, A has pointed towards the culpability of certain individuals involved in litigation about failures with regard to reporting requirements. Again, I don't think this impacts the outcome of this specific complaint because the obligation to report to F&L was Mrs M's through A and A haven't demonstrated that they reported the offer to F&L at all in any shape or form here.

F&L also turned down the claim on the basis that A did not keep them informed about anything that materially impact the prospects of the claim. They point to A's calculation that Mrs M wouldn't suffer a loss on the claim itself. I don't think this issue is one I need to explore in this decision because I don't think it makes a difference to the outcome of this complaint. I say so because it's clear that there came a point where the claim didn't have reasonable prospects of success, otherwise A would not have discontinued it on Mrs M's behalf, given the grave consequences to her in doing so. So, whether A failed to disclose their calculation is academic. A's failing to disclose the offer to F&L then continuing to proceed with the claim is in my view enough for F&L to conclude that nothing is payable

under the policy because they have been prejudiced.

Turning now to whether F&L were entitled to void this claim. The policy terms say:

“6.1 For the avoidance of doubt, if the Appointed Representative and/or the Insured is found to have acted dishonestly or adverse findings as to credibility and honesty are made by a court, The Insurer reserves the right to void the Policy ab initio.

6.2 The Insurer shall be entitled to void the Policy ab initio where there has been any non-disclosure or misrepresentation of material facts or untrue statements made by the Insured prior to and after Inception or at any time during the course of the Proceedings.”

I haven't seen any evidence to support that either Mrs M or A acted dishonestly nor that any findings as to their credibility or honesty were made by a Court in this case. Equally there is nothing to support that they misrepresented the position to F&L. Rather A's actions are ones of non-disclosure which led to prejudice to F&L. But these don't entitle F&L to void the policy. As such I don't think they should have done so. I've set out what F&L should do to put things right in respect of this.

Putting things right

F&L should:

- amend their records to reflect that Mrs M's policy is not recorded as voided and confirm this to her in writing.
- include information in the letter to say that the policy was wrongly voided and that she need not declare this to future insurers as a result.

My final decision

For the reasons set out above, I uphold Mrs M's complaint and direct Financial & Legal Insurance Company Ltd to comply with my award of fair compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 9 April 2025.

Lale Hussein-Venn
Ombudsman